90-908 (1)

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

E. D. CHRISTENSEN,

PETITIONER,

V.

INTERNAL REVENUE SERVICE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

E. D. CHRISTENSEN
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QUESTIONS PRESENTED FOR REVIEW

Where it has been established that an agency of government has disregarded constitutional limits, the law, regulations and procedures, whether a court may lawfully refuse, or avoid, ordering the agency to comply with said authority ?

Whether a Court of Appeals may lawfully impose sanctions, based upon its own ruling of a frivolous appeal, where a law of the United States was cited by the appellant, and not contradicted and without citing a constitutional provision, or law, authorizing said court to impose such sanctions ?

Whether a Court of Appeals may lawfully bar a citizen's appeal in a Court of Appeals without citing a constitutional provision, or law pursuant to the Constitution, authorizing said Court to so bar ?

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All parties are shown in the caption.

OPINIONS BELOW

The opinions of the Courts below are in the Appendix of this Petition, beginning at A-1 (Appendix, page 1)

JURISDICTION OF THIS COURT

The grounds on which the jurisdiction of this Court is invoked are as follows:

The date of the Order sought to be reviewed is August 13, 1990.

The date of the Order denying Petition for Rehearing is September 6, 1990.

There is no Order granting extention of time in which to petition for a writ

of certiorari.

The statutory provision believed to confer on this Court jurisdiction to review the Order in question by writ of certiorari is 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

CONSTITUTIONAL PROVISIONS: Article VI, Paragraph 2.

Amendments 1, 4, 5, 9, 10, 13 and 16.

STATUTES: 26 U.S.C. Sections 6012, 6020 and 6201, 28 U.S.C. Sections 453, 455 and 1361, 18 U.S.C. Sec. 241

REGULATIONS: Federal Income Tax Regulation, Sec. 1.6012-1(5), I.R.S. Delinquent Return Procedures, Sections 5290, 5291 and 5293.3.

STATEMENT OF THE CASE

This action is in the nature of a petition for Mandamus to compel the Internal Revenue Service to perform a duty owed to

Plaintiff E. D. Christensen. The duty owed to Plaintiff is compliance with the laws, regulations, and procedures.

This action was generated by the Internal Revenue Service (hereafter I.R.S.) by sending a letter to Christensen (hereafter Petitioner) dated January 21, 1988, concerning individual income tax returns, and threatening to prepare returns for Petitioner, if no contact within 10 days of the I.R.S. letter. Petitioner responded to said letter on Jan 29, 1988 by certified mail No. P-573 715 159, citing and explaining 26 U.S.C. secs. 6012 and 6020(b)(1) and (b)(2). The I.R.S. did not respond to said Jan. 29, 1988 letter. On October 18, 1988 the I.R.S. sent Petitioner another letter together with froms titled "Report of Individual Income Tax Examination Changes". Said forms show Petitioner's name, Form 1040, years 1984, 1985, and 1986, income amounts, exemption amounts, deficiency

amounts, balance due amounts penalty amounts, a consent to assessment and collection statement, and a place for Petitioner's signature. Petitioner did not sign the forms, but responded to said letter and forms on Oct. 30, 1988 by certified mail No. P 777 387 142, again explaining 26 U.S.C. secs. 6012 and 6020 in more detail and citing additional authority, including testimony of the head of the Alcohol and Tobacco Tax Division, Bureau of Internal Revenue that "Your income tax is 100 percent voluntary tax .." and a letter from a communications and language expert agreeing with Petitioner's analysis of 26 U.S.C. sec. 6012.

On Nov. 5, 1988 Petitioner requested a hearing on said "Report of Individual Income Tax Examination Changes" by certified mail No. P 777 387 143. The I.R.S. responded to said letter on March 24, 1989, citing Mertins Law of Fed. Income Tax,

Comm sec. 6012. Petitioner responded to said letter on Apr. 5., 1989, by certified mail No. P 777 388 939, requesting time certain and place for the requested hearing. The I.R.S. responded to Petitioner's letter setting the date, May 10, 1989, at Salt Lake City and time of 1:00 P.M.. Petitioner confirmed the date, place and time of hearing on April 15, 1989, by certified mail No. P 777 388 941. Hearing was held on May 10, 1989 at the place and time, however, the I.R.S. would not permit Petitioner's representative to represent him. The hearing accomplished nothing. Petitioner sent another letter to I.R.S., dated May 30, 1989, by certified mail No. P 298 078 461. The I.R.S. responded to said letter on June 20, 1989 announcing that a Notice of Deficiency would be issued forthwith. A Notice of Deficiency letter was issued July 25, 1989. Petitioner requested an administrative hearing on the matter on

July 27, 1989. The I.R.S. responded to said letter on August 9, 1989 announcing: "As soon as your case is petitioned to the Tax Court so inform us, I will arrange to meet with you ..."

Petitioner filed his complaint in the United States District Court, District of Utah, Central Division on Sept. 2, 1989. Petitioner filed request for discovery on Nov. 20, 1989. The I.R.S. filed answer to the complaint on Dec. 7, 1989. Petitioner filed a second request for production of documents on Dec. 23, 1989. The I.R.S. filed a motion for protective Order and a motion to dismiss on Jan. 4, 1990. Petitioner filed opposition to motion to dismiss on Jan. 16, 1990. Hearing was held on Jan. 29, 1990, before Magistrate Gould. On Feb. 5, 1990, Magistrate Gould issued his Report and Recommendation, Petitioner filed objections to the Magistrates Report and Recommendation on Feb. 13, 1990. On Feb.

15, 1990 Magistrate Gould issued a protective Order against discovery. Petitioner filed an amended complaint on March 8, 1990. On March 9, 1990 hearing was held on objections to Magistrate's Report and Recommendation. On March 13, 1990, Judge Winder issued his Order Affirming Report and Recommendation of Magistrate and Dismissing Case for Lack of Subject Matter Jurisdiction. On April 2, 1990 Petitioner filed a Motion to Reconsider and to Vacate Judge Winder's Order. On May 2, 1990 the I.R.S. filed a memorandum in Opposition to Motion to Reconsider. On May 7, 1990, Judge Winder issued an Order Denying Motion to Amend Complaint and Motion to Reconsider. On May 22, 1990, Petitioner filed a Motion to Vacate. On May 29, 1990, Judge Winder issued his final Order Denying Motion to Vacate. Notice of Appeal was filed on June 18, 1990, with filing fee of $105. Petitioner filed his Brief of

Appellant on July 25, 1990. Petitioner received no Brief or motion to dismiss fron the I.R.S. The Court of Appeals issued its Order dismissing the appeal on Aug. 13, 1990. Petitioner filed his Petition for Rehearing on Aug. 24, 1990. The Court of Appeals issued an Order denying the Petition for Reheating on Sept. 6, 1990.

The basis for Federal jurisdiction in the court of first instance is 28 U.S.C. Sec. 1361.

ARGUMENT

The writ should be allowed because provisions of the U. S. Constitution have been disregarded, the law has been disregarded, and a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Since justices and judges take the oath, set out in 28 U.S.C. Sec. 453, to perform

their duties agreeable to the Constitution and laws of the United States, any departure from constitutional provisions or law would not be an accepted and usual course of judicial proceedings.

Numerous other authorities establish that the Constitution and laws of the United States must be followed. Cannons of Judicial Ethics, No 20 provides: "A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him." Another, "We will not make any judiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed

to observe it." Magna Carta, XLV. Another, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163. And another, "In a government of laws, existance of the government will be imperiled if it fails to observe the law scrupulously." Olmstead v. United States, 277 U.S. 438, 485.

The above authorities show that the individual has the right to protection of the laws, that it is the duty of government to afford that protection, that it is the duty of a judge to apply the law to particular instances, and to perform his duties agreeably to the Constitution and laws of the United States, that judiciaries shall not be made, but from those who understand the law and are well disposed

to observe it, and that the existence of the government will be imperiled if it fails to observe the law scrupulously. I find absolutely no authority authorizing courts to refuse to compel the I.R.S. to follow the law, regulations and procedures in their actions concerning Petitioner, and none is cited in either court decision. The District Court should have ordered the I.R.S. to do so.

If the I.R.S. personel had understood the law and were well disposed to observe it, they would not have sent Petitioner their first letter. Even so, in his response to said letter, he cited 26 U.S.C. sections 6012 and 6020(b), explaining that said sections excepted him from making returns, and that the I.R.S. could not lawfully make returns for him.

Eight and one half months after Petitioner's response the I.R.S. sent Petitioner three returns for his signature, titled:

"Report of Individual Income Tax Examination Changes" (see pages 3 & 4, supra). Since there were no returns to examine, said "Reports" were fraudulent and contrary to law. (see 26 U.S.C. sec. 6020(b)) Further, said "Report of Individual Income Tax Examination Changes" contained the words "FORM: 1040". I.R.S. Delinquent Return Procedures, Sec. 5290 is titled: "Refusal to File-IRC 6020(b) Assessment Procedure". Section 5291 shows 8 Forms involved. Form 1040 is not listed, yet the "Report of Individual Income Tax Examination Changes" shows "FORM 1040", which shows that I.R.S. personel did not follow the above procedures. Section 5293.3 is titled: "Signing Tax Returns" and says: "The following statement shall be typed or printed at the bottom of the return. "This return was prepared and signed under the authority of Section 6020(b) of the Internal Revenue Code." Of course Section

6020(b) only authorizes the I.R.S. to prepare returns for persons required to make returns, not individuals excepted from making returns under section 6012, and certainly not a form 1040, supra.

Because Magistrate Gould granted the I.R.S. a protective order, and judge Winder affirmed the Magistrate's Report and Recommendation, the returns prepared by the I.R.S., concerning Petitioner, were kept out of the record.

Further, Federal Income Tax Regulation Sec. 1.6012-1(5) provides: "Whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing him to represent his principle in making, executing, or filing the return." No I.R.S. agent had a power of attorney to make, execute, or file a return for Petitioner.

26 U.S.C. Sec. 6012 is perfectly clear with respect to the requirement of individ-

uals to file income tax returns. It reads in part, for the years in question: "Returns with respect to income taxes under subtitle A shall be made by the following: (1)(A) Every individual having for the taxable year a gross income of $1,000 (the exemption amount) or more, except that a return shall not be required of an individual (other than an individual described in subparagraph (C))-" (1984 Code) Petitioner is not described in subparagraph (C). (see appendix)

Petitioner even explained why individuals must be excepted from making returns, in his MEMORANDUM IN SUPPORT OF MOTION TO VACATE, dated May 22, 1990, filed in the District Court. It reads:

"Section 6012 reads in part: (quoting the above and underlining: <u>except that a return shall not be required of an individual (other than an individual described in subparagraph (C))-...</u>) (emphasis added)

(continuing quotation) If Judge Winder had read subparagraph (C) he would have known that Plaintiff was not described in said paragraph and therefore was not required to make an income tax return.

Further, if Judge Winder had been competent concerning limitations of law, he should have known that no valid law could ever exist requiring Plaintiff to make and file income tax returns, because such a law would not be pursuant to a provision of the Constitution, and would be repugnant to the Constitution. The Supreme Court has ruled:

> "It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution have that rank.
>
> Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments,

> are bound by that instrument." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180.

(continuing quotation) Essentially, a law must be pursuant to the Constitution to have the rank of supreme law, and a law repugnant to the Constitution is void. Obviously there is no provision in the Constitution to which a law requiring Plaintiff to make and file income tax returns, is pursuant to. And such a law would obviously be repugnant to both the Fourth and Thirteenth Amendments. The Supreme Court has ruled:

> "We have recognized that the principal object of the Fourth Amendment is the protection of privacy ..." Warden v. Hayden, 387 U.S. 294, 304.

(continuing quotation) Certainly a law requiring Plaintiff to report his private financial information to the government would be repugnant to the principal object of the Fourth Amendment which is the protection of privacy, therefore, such a law would be void, under Marbury v. Madison,

supra, even if it did exist.

Further. Amendment Thirteen of the U.S. Constitution prohibits involuntary servitude as follows:

> "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Amendment Thirteen.

Involuntary servitude is defined as follows:

> "INVOLUNTARY SERVITUDE. The condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not." (citations omitted) Black's Law Dictionary.

(continuing quotation) It then follows that if Congress enacted a law that compelled Plaintiff to do the labor of keeping records and making returns, against his will, by use of coercion of imprisonment for failure to do so, the Congress would be practicing involuntary servitude, prohibited by the Thirteenth Amendment. Certainly such a law would be repugnant to the Con-

stitution and void, under Marbury v. Madison, supra. Such explains the reason for the exception of individuals (Plaintiff) in 26 U.S.C., Sec. 6012, supra.

Further, the taxing provisions of the Constitution cannot imply the power to require individuals to make or file returns. Such is shown by the following:

> "EXPRESSIO UNUIS EST EXCLUSIO ALTERIUS. Expression of one thing is the exclusion of another." (citations omitted) Black's Law Dictionary.
>
> "When certain persons or things are specified in law, contract, or will, an intention to exclude all others from its operation may be inferred." Little v. Town of Conway, 171 S.C. 27; 170 S.E. 447, 448.

(continuing quotation) The expression of the power to lay and collect taxes, in the Constitution, infers an intention to exclude the power to require Plaintiff to make and file returns from its operation.

It is now clear that there never has been, and never can be, a valid law requiring Plaintiff to make and file income tax

returns." (end of quotation)

The foregoing was filed in the District Court and was sent to the Court of Appeals with the record. The same information was presented to the Court of Appeals in Appellants brief. The I.R.S. has not contradicted my argument, nor has either Court, yet both Courts have dismissed my case. Disregarding or avoiding uncontradicted argument by dismissal is alleged to be so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is now clear that the I.R.S. had knowledge of constitutional limitations, the law, regulations and procedures and that both lower courts had the same information. Both courts knew that the I.R.S. was not observing constitutional limitations, nor following the law, regulations and procedures in their actions against

Petitioner, therefore, both lower courts should have ordered the I.R.S. to do so. They did not.

The District Court dismissed for alleged lack of subject matter jurisdiction. A Court of Appeals has ruled: "In mandamus action under 28 USCS Sec. 1361, usually seperate questions of jurisdiction and failure to state a claim merge; there can be no mandamus jurisdiction if no duty exists on the part of defendants, while if duty does exist, not only is there jurisdiction under Sec. 1361 but also plaintiff has adequately stated a claim in asking that such duty be fulfilled." Davis Associates, Inc. v. Secretary, Dept. of Housing & Urban Development (1974, CA1 NH) 498 F.2d 385. It is obvious that the District Court did have subject matter jurisdiction.

In consideration of the aurhorities cited at pages 8, 9 and 10 of this Petition, it

is alleged that the District Court so far departed from the accepted and usual course of judicial proceedings, by not ordering the I.R.S. to observe constitutional limitations and follow the law, regualtions and procedures, as to call for an exercise of this Court's power of supervision.

The reason for presenting the foregoing authority, filed in the District Court, is to show bias, and thus lack of due process. The Supreme Court has ruled: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial case." In Re Murchison et al., 349 U.S. 133, 136. The definition of bias is: "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." (citations omitted) Black's Law Dictionary. Since the mind of the District judge was obviously not perfectly open to

conviction that 26 U,S.C. Sec. 6012 means what it says, that a valid law must except individuals from making returns in order to be pursuant to, and not repugnant to, the Constitution, that the I.R.S. is not following the Constitution, laws, regulations nor procedures in their actions against Petitioner, actual bias in the District Court is obvious.

Since the record was sent to the Court of Appeals, and the minds of the Judges of said Court were obviously not perfectly open to conviction of the same facts, there is obvious bias in the Court of Appeals.

The Court of Appeals did not rule on Petitioner's arguments, they used another ploy to avoid the truth and accomplish their purpose of protecting the I.R.S. from being ordered to follow the Constitution, laws, regulations and procedures. They dismissed Petitioner's appeal because Petitioner has not paid sanctions imposed

by the same Court (Tenth Circuit Court of Appeals) for presenting the same law (26 U.S.C. Sec 6012, and showing wrongdoing by the I.R.S.) which they ruled as a frivolous appeal.

Of course Petitioner's appeal could not have been ruled frivolous under the definition of a frivolous appeal, which is: "A "frivolous appeal" is one presenting no justicable question and so readily recognizable as devoid of merit on face of record that there is little prospect that it can ever succeed." (citations omitted) Black's Law Dictionary. An appeal that presents a law of the United States and shows that said law is not being followed certainly cannot be judged a frivolous appeal under the foregoing definition.

The reasoning of the judges of said Court of Appeals, in imposing sanctions on Petitioner, was obviously to punish Petitioner for exposing wrongdoing by the I.R.S.

and to cover up that wrongdoing. The judgment of the Court of Appeals becomes even more rediculous by rewarding Department of Justice attorneys with the sanction money for their cover up of the wrongdoing. And even more rediculous in considering that the United States has a whistle blower program to reward persons for reporting wrongdoing.

Department of Justice attorneys filed argument, in the Court of Appeals, in support of sanctions against Petitioner. Said argument implied that if this Court denied certiorari the decisions of the lower courts, bias and errors included, become final. Such is not in agreement with either the Constitution nor the published definition of a final decision, which is: "One which leaves nothing open to further dispute and which sets at rest cause of action." According to said definition, a decision cannot be final until nothing is

left open to further dispute, such as, whether the decision is in agreement with the Constitution and laws, which none of the former decisions were. Certainly no court decision can be final when it is in conflict with the Constitution or law. When Petitioner presented the foregoing argument showing that the law excepted him from making returns, that no law requiring individuals to make returns would be pursuant to the Constitution, but would be repugnant to the Fourth and Thirteenth Amendments, the Court of Appeals should have vacated its sanctions against Petitioner rather than impose new ones, and dismiss the appeal. Further, there is no power delegated to the United States by the Constitution to declare court decisions final where such decision is open to dispute. And, of course, powers not delegated to the United States by the Constitution are not possessed. (Amendment

Ten, U. S. Constitution)

The current order of the Court of Appeals adds additional injury to Petitioner by depriving him of access to the courts. Such is clearly irrational because no such power has been delegated to the United States by the Constitution. Also the same Court of Appeals affirmed a District Court judgment where said Court ruled: "constitution guarantees access rather than success" (see No. 90-671, this Court). Since it has been admitted that the Constitution guarantees access to the courts, such access becomes a right. It is alleged that denying Petitioner access to the Court of Appeals, after proper filing fee had been paid, amounts to a conspiracy against Petitioner's right to said access, in violation of 18 U.S.C. Sec. 241. Particularly where no constitutional provision or law is cited authorizing said Court to deny access, and while said judges were

under oath to perform their duties agreeably to the Constitution and laws of the United States.

Further, said judges acted arbitrarily because there was no motion before the Court of Appeals to dismiss the appeal for failure to pay the sanctions. It is alleged that such arbitrary act is contrary to Cannons of Judicial Ethics No. 20.

It is alleged that dismissing Petitioner's appeal, rather than ordering the I.R.S. to observe and apply constitutional principles (Marbury, supra), the law, regulations and procedures, is not a judicial decision as defined: "Application by a court or tribunal exercising judicial authority of competent jurisdiction of the law to a state of facts proved, or admitted to be true, and a declaration of the consequences which follow." (emphasis added) (citations omitted) Black's Law Dictionary. Of course, a court of competent jurisdic-

tion has no judicial authority other than application of the law to a state of facts proved, if a judicial decision is to be made. Dismissing Petitioner's appeal rather than ordering the I.R.S. to do its duty, owed to Petitioner, to afford him protection of the laws, supra, is clearly not a judicial decision.

If Petitioner's property is taken because of bias in the courts below, i.e. because the minds of the judges of those courts, and the justices of this court cannot be convinced that the law means what it says nor that the I.R.S. is not observing constitutional limits nor following the law, regulations and procedures, such taking will be without due process of law, supra, in violation of Amendment Five of the U. S. Constitution.

Here we have a situation where the I.R.S. sent Petitioner a letter, contrary to law, threatening to prepare returns for

him if he did not contact them within 10 days. Petitioner responded explaining the law. The I.R.S. did not answer, but disregarded Petitioner's letter and eitht months later prepared three returns for Petitioner's signature, containing "Form 1040". Petitioner responded with a second letter again explaining the law. Again the I.R.S. failed to answer. After several more letters the I.R.S. stated their position, citing Mertins law of Fed. Income tax Comm. 6012, and other regulations, instead of 26 U.S.C. Sec. 6012 and regulations "made thereunder" (see Sec. 6020(b)). Then they issued a Notice of Deficiency letter, which made Petitioner's action necessay.

In the District Court proceedings, I.R.S. attorney Lusty moved for a protective order and to dismiss for lack of subject matter jurisdiction. Magistrate Gould granted the protective order which prevented discovery of the returns prepared for

Petitioner by the I.R.S., in violation of I.R.S. Delinquent Return Procedures, and either unsigned or fraudulently signed contrary to 26 U.S.C. Sec. 6020(b)(2), Delinquent Return Procedures Sec. 5293.3 and Fed. Income Tax Reg. 1.6012-1(5), which had to be the the returns used to prepare the Notice of Deficiency and assessment. District Judge Winder dismissed Plaintiff's action for lack of subject matter jurisdiction and denied Petitioner's motion to vacate.

The Court of Appeals received the record filing fee and Petitioner's brief, which again explained the law and constitutional reasons why the law must except individuals from making returns, but chose to dismiss Petitioner's appeal for failure to pay obviously wrongfully imposed sanctions, and arbitrarily, without a motion, or brief, before the Court requesting such dismissal. Then, said Court denied Petitioner's peti-

tion for Rehearing. The Petition for Rehearing also had a suggestion for rehearing en banc, which was also disregarded and denied by the same judges who dismissed the appeal. Another arbitrary act.

Because the actions of the judges of the Court of Appeals, as well as the District Court, do not agree with their oaths of office, the Cannons of Judicial Ethics, disregards the law, regulations and procedures, disregards Supreme Court and other Court of Appeals decisions, disagrees with published definitions of a frivolous appeal, judicial decision and final decision, clearly shows bias and lack of due process of law, for which they should have disqualified themselves under 28 U.S.C. Sec. 455, disregarded and violated Petitioner's rights to protection of the laws and access to the courts, acted arbitrarily without motion to dismiss the appeal, and without hearing en banc, and that the Fifth

Amendment of the U. S. Constitution will be violated if Petitioner's property is taken without due process, it is alleged that the Court of Appeals, and the District Court, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This is the fifth time that Petitioner has presented 26 U.S.C, Sec 6012, and other I.R. Code sections, regulations and procedures to this Court. Integrety of the Judicial system, and government, warrants a fair hearing.

For the foregoing reasons certiorari should be allowed.

Sincerely submitted,

E. D. Christensen

Dated: Nov. 24, 1990

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
AUG 13 1990
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

E. D. CHRISTENSEN, Petitioner-Appellant,	No. 90-4096
vs.	D.C. # 89-CV-806-W
INTERNAL REVENUE SERVICE, Respondent-Appellee.	

ORDER

Before LOGAN, SEYMORE and ANDERSON, Circuit Judges.

Appellant has not paid the sanction imposed in Christensen v. Commissioner, No. 87-2158, slip op. (10th Cir. Feb. 24, 1988). Mr. Christensen may not pursue new matters in this court until the outstanding

sanction is paid. Shiff v. Simon & Schuster, Inc., 766 F.2d 61, 62 (2nd Cir. 1955)

This appeal is dismissed. A certified copy of this order shall stand as and for the mandate of the court.

Entered for the Court
ROBERT L. HOECKER, Clerk
By: /s/
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

E. D. CHRISTENSEN, Plaintiff, -vs- INTERNAL REVENUE SERVICE, Defendent,	ORDER AFFIRMING REPORT AND RECOMMENDATION OF MAGISTRATE AND DISMISSING CASE FOR LACK OF SUBJECT MATTER JURISDICTION Civil No: C-89-806W

On Feburary 5, 1990 the United States Magistrate, Honorable Calvin Gould, issued

his report and recommendation that this case be dismissed for lack of federal subject matter jurisdiction. Thereafter, timely objections to that report and recommendation were filed by plaintiff, On March 9. 1990, oral argument was heard on those objections. At the hearing plaintiff appeared pro se and the United States was represented by Kirk C. Lusty. Following oral argiment and after taking the matter under advisement, the court has further considered the law and the facts relating to this matter.

The facts are adequately set forth in the magistrate's report and recommendation and will not be repeated here. Plaintiff brought this action asserting federal subject matter jurisdiction under 28 U,S. C. Sec. 2361, which provides:

> The District Courts shall hsve original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

By his complaint, plaintiff claims that the Internal Revenue Service has a duty to grant him an administrative hearing and certain other rights mandated under the Code of Federal Regulations, 26 C.F.R. 501.105 et seq. Plaintiff seeks to obtain this releaf by mandamus from this court under the above quoted statute. The magistrate concluded in his report and recommendation that no such duty was owed under the cited sections of the code which are relied upon by the plaintiff. This court agrees with that conclusion and also with the reasoning of the magistrate set forth in his report and recommendation.

Plaintiff's principle objection to the report and recommendation is that the magistrate has erroneously ruled that the court has no subject matter jurisdiction after having stated what the facts were and having made a ruling on the merits based on these facts. In his objections,

plaintiff asks rhetorically, How can the Magistrate cite and consider facts and then rule on the merits of the controversy without first assuming jurisdiction over the controversy?" The answer to this is that it is impossible for the magistrate or this court to make a determination as to whether a duty is owed the plaintiff, enforceable by mandamus under Sec. 1361, without determining what the facts are and then considering whether under those facts a duty is owed to plaintiff by an agency of the United States. This is all the magistrate did here as reflected by his report and recommendation and that is what this court does whenever it is asked to decide whether it has federal subject matter jurisdiction over a claim asserted by a party. The file reflects that the facts as set forth in the magistrate's report and recommendation, which are alleged to give this court subject matter jurisdiction, are the

true facts and it is evident in reviewing those facts that federal subject matter jurisdiction does not exist under 28 U.S.C. Sec. 1361. Hence, the magistrate proceeded appropriate in determining what the facts were before making his recomendation.

At the hearing of March 9, 1990, plaintiff advised the court and defendant's counsel that he had filed an amended complaint in this action although neither this court nor defendant's counsel had seen a copy of the amended complaint at the time of the hearing. This amended complaint was filed contrary to the provisions of Rule 15 Fed. R. Civ. P. which provides that a party may not amend his complaint after a responsive pleading has been filed by an adverse party unless the amendment has been allowed by leave of court or by written consent of the adverse party. In this case, defendant has filed a responsive pleading to plaintiff's complaint and no

leave of court or written consent by the defendant has been given which would allow the plaintiff to file an amended complaint. Hence, the court has no alternative but to order that the amended complaint is stricken since not filed in accordance with Fed. R. Civ. P.

Accordingly,

IT IS HEREBY ORDERED as follows:

1. The report and recommendation of the magistrate is affirmed by this court.

2. Plaintiff's complaint is dismissed for lack of subject matter jurisdiction.

3. Plaintiff's amended complaint is stricken.

Dated this 11 day of March, 1990.

/s/
David K. Winder
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

E. D. CHRISTENSEN, Plaintiff, -vs- INTERNAL REVENUE SERVICE, Defendant.	ORDER DENYING MOTION TO AMEND COMPLAINT AND MOTION TO RECONSIDER Civil No: C-89-806W

On March 11, 1990, this court entered its order affirming the report and recommendation of the magistrate and dismissing plaintiff's complaint for lack of subject matter jurisdiction. Further, that order struck plaintiff's amended complaint which had been filed without leave of court. Thereafter, the plaintiff filed a motion to amend his complaint and to reconsider this court's order of March 11, 1990. The plaintiff has filed various pleadings in support of his motions and the defendant has filed a memorandum in opposition thereto.

Having now considered the foregoing and good cause appearing,

IT IS HEREBY ORDERED that plaintiff's motion to amend his complaint and Plaintiff's motion for reconsideration of the order entered by this court on March 11, 1990, are denied, and said order is affirmed.

The reason this court is denying plaintiff's motion to amend his complaint is not based on its timeliness. Rule 15 Fed. R. Civ. P. dictates that amendments be granted with liberality. However, plaintiff's amended complaint no more states a basis for subject matter jurisdiction by this court over plaintiff's claims than did his original complaint. In his proposed amended complaint, plaintiff additionally claims subject matter jurisdiction based on 28 U.S.C. Sec. 1340. That section does not grant this court subject matter jurisdiction since there has been no waiver of

sovereign immunity by the defendant in the circumstance involved here, that being that the plaintiff is attempting to challenge an income tax assessment by the Internal Revenue Service under circumstances where he has not paid in full the taxes claimed to be due.

Dated this 7th day of May, 1990.

/s/
David K. Winder
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

E. D. CHRISTENSEN,
Plaintiff,

-vs-

INTERNAL REVENUE SERVICE,
Defendant.

ORDER

Civil No: C-89-806W

After very careful consideration of plaintiff's motion to vacate this court's order of May 7, 1990, and the accompanying

memorandum in support, the court respectfully denies plaintiff's motion. Should plaintiff wish to pursue this matter further, he should proceed by a writ of mandamus or by an appeal to the Tenth Circuit Court of Appeals.

Accordingly, based on the foregoing and good cause appearing,

IT IS ORDERED that plaintiff's motion to vacate this court's order of May 7, 1990 is denied. This order will suffice as the court's ruling on this motion and no further order need be prepared by counsel.

Dated this 29th day of May, 1990.

/s/
David K. Winder
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

E. D. CHRISTENSEN,	)	
Petitioner-Appellant,	)	
v.	)	No. 90-4096
INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

ORDER

Filed September 6, 1990

Before LOGAN, SEYMORE and ANDERSON, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/
Patric Fisher

Chief Deputy Clerk

CONSTITUTIONAL PROVISIONS

ARTICLE VI, Par. 2.

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT ONE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedon of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMEMDMENT FOUR

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FIVE

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT NINE

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively. or to the people.

AMENDMENT THIRTEEN

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction.

AMENDMENT SIXTEEN

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

STATUTES

26 U.S.C. Sec 6012 PERSONS REQUIRED TO MAKE RETURNS OF INCOME.

(a) GENERAL RULE.-Returns with respect to income taxes under subtitle A shall be

made by the following:

(1)(A) Every individual having for the taxable year a gross income of $1,000 (the exemption amount) or more, except that a return shall not be required of an individual (orher than an individual described in subparagraph (C))- ...

(c) The exception under subparagraph (A) shall not apply to-

(i) a nonresident alien individual;

(ii) a citizen of the United States entitled to the benefits of section 931;

(iii) an individual making a return under section 443(a)(1) for a period of less than 12 months on account of a change in his annual accounting period.

(iv) an individual who has income (other than earned income) of the exemption amount or more and who is described in section 63(e)(1)(D); or

(v) an estate or trust.

SEC. 6020. RETURNS PREPARED FOR OR EXECUTED BY SECRETARY.

(b) EXECUTION OF RETURN BY SECRETARY-

(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN.- If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) STATUS OF RETURNS.-Any returnso made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

SEC. 6201. ASSESSMENT AUTHORITY.

(a) AUTHORITY OF SECRETARY.- The Secretary is authorized and required to make the inquires, determinations, and assessments of all taxes (including interest, additional

amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.-The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns are made under this title.

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28 U.S.C. Sec. 453 Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and

that I will faithfully and impartially discharge and perform all duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

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28 U.S.C. Sec. 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

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28 U.S.C. Sec. 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

18 U.S.C. Sec. 241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; ...

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

REGULATIONS AND PROCEDURES

Federal Income Tax Regulation 1.6012-1 (5)

Whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing him to represent his principle in making, executing, or filing the return.

I.R.S. Delinquent Return Procedures

5290 (11-15-85)

Refusal to File-IRC 6020(b) Assessment Procedure

5291 (11-15-85)

Scope

(1) The procedure applies to employment, excise and partnership tax returns. Generally, the following returns will be involved.

(a) Form 940, Employer's Quarterly Annual Federal Unimployment Tax Return;

(b) Form 941, Employer's Quarterly Federal Tax Return;

(c) Form 942, Employer's Quarterly Tax Return for Household Employees;

(d) Form 943, Employer's Annual Tax Return for Agricultural Employees;

(e) Form 11-B, Special Tax Return- Gambling Defices; (note)

(f) Form 720, Quarterly Federal Excise Tax Return

(g) Form 2290, Federal Use Tax Return on Highway Motor Vehicles;

(h) Form CT-1, Employer's Annual Railroad Retirement Tax Return;

(i) Form 1065, U.S. Partnership Return of income.

5293.3 (11-15-85)

Signing Tax Returns

The following statement shall be typed or printed at the bottom of the return. "This return was prepared and signed under authority of Section 6020(b) of the Internal Revenue Code.

Do not assess failure to pay.